

## ***Declaration of Public Policy <sup>1</sup>***

It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist the injured worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

A worker's removal from the work force due to a work-related injury or disease has a negative impact on the injured worker, the injured worker's family, the employer, and the general public. Therefore, the main objective of the workers' compensation system is to return injured workers to work as soon as possible after suffering a work-related injury or disease.

Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to obtain benefits speedily and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

Title 39, chapters 71 and 72, MCA Workers' Compensation and Occupational Disease Acts, must be construed according to their terms and not liberally in favor of any party.

The legislature's intent regarding stress claims, often referred to as "mental-mental claims" and "mental-physical claims", does not allow for compensation under Montana's Workers' Compensation and Occupational Disease Acts. The legislature recognizes that these claims are difficult to verify objectively and that the claims have a potential to place an economic burden on the workers' compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. The legislature has the authority to define the limits of the workers' compensation and occupational disease systems.

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<sup>1</sup> §39-71-105, MCA

## ***Insurance - Who's Covered, Who's Not***

If you are an employer or an employee, the Workers' Compensation and Occupational Disease Acts apply to you. An employer who has an employee in service under any appointment or contract of hire, expressed or implied, oral or written, must elect to be bound by the provisions of compensation Plan 1 (self-insured), Plan 2 (private insurance companies) or Plan 3 (Montana State Fund).

### **Employment Exempted**

The Workers' Compensation and Occupational Disease Acts may not apply to any of the following employments:

- Household and domestic employment
- Casual employment
- Dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code
- Sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company
- Real estate, securities or insurance salesperson paid solely by commission without a guarantee of minimum earnings
- A direct seller
- Employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States
- A person performing services in return for aid or sustenance only, except employment of volunteers
- Employment with a railroad engaged in interstate commerce, except railroad construction work
- An official, including a timer, referee, umpire or judge, at a school amateur athletic event
- A person performing services as a newspaper carrier or freelance correspondent
- Cosmetologist's services and barber's services
- A person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the reservation
- A jockey who is performing under a license issued by the Board of Horse Racing, from the time the jockey reports to the scale room prior to a race through the time weighed out and has acknowledged in writing that jockey is not covered while performing services as a jockey
- Trainer, assistant trainer, exercise person or pony person who is providing services under the Board of Horse Racing while on the grounds of a licensed race meet
- An employer's spouse
- A petroleum land professional
- An officer of a quasi-public or a private corporation or manager of a manager-managed limited liability company
- A person who is an officer or a manager of a ditch company
- Service performed by an ordained, commissioned or licensed minister of a church
- Independent Contractors
- Providers of companionship services or respite care if the person providing care is hired by a family member or legal guardian.

## ***Life of a Claim***

Accidents do happen and when a Montana worker files a workers' compensation claim, the life of that claim is dictated primarily by statute. Progress of a typical workers' compensation claim in Montana is determined by the following guidelines:

- Once the injury occurs, the injured worker or their authorized representative has 30 days from the date of injury to notify the employer (employer, managing agent or superintendent in charge of the work) or the insurer. [§39-71-603, MCA]
- The employer then has six days from date of notification of an injury to report the injury to the insurer or the Department of Labor and Industry. [§39-71-307, MCA, and ARM 24.29.801]
- The claimant or the claimant's representative has 12 months from the date of injury to file a claim. [§39-71-601(1), MCA] The claim filing time can be extended up to an additional 24 months if it can be proven that the worker was somehow prevented from filing the claim because of something the employer or the insurer said or did, or if the injury was latent or the worker lacked knowledge of disability. [§39-71-601(2), MCA]
- The signed claim form or First Report of Injury and Occupational Disease (FROI) (form ERD-991) can be submitted to the employer or sent directly to the insurer, the adjuster or the Department of Labor and Industry. [§39-71-601(1), MCA]
- The insurer/adjuster shall accept or deny a claim within 30 days of receipt of a signed claim for compensation by the claimant or the claimant's representative. If the claim is denied, the worker is notified in writing of the denial. [§39-71-606, MCA]
- If further investigation is needed before the insurer accepts liability and the 30 day limitation for a decision on compensability is due to expire, the insurer/adjuster may pay wage loss and/or medical benefits without such payment being an indication of admission of liability or waiver of any right of defense. [§§39-71-608 and 39-71-615, MCA]
- The first 4 days or 32 hours (whichever is less) of total wage loss is not compensable but a claimant may use sick leave during this time. A claimant cannot use sick leave and receive wage loss benefits at the same time. [§39-71-736, MCA]
- In addition to using an emergency room or urgent care center, the claimant has the right to select the first treating physician (within the treating physician definition). The insurer must then approve changes of treating physicians. The insurer has the right to deny payment for any unauthorized medical referrals and treatments. [§39-71-1101, MCA, and ARM 24.29.1510]
- The physician bills the insurer/adjuster directly. Payment is made according to a fee schedule. [§39-71-704(2) and (3), MCA] Once the insurer has accepted a claim, the medical provider must accept the fee scheduled reimbursement, as payment in full and the claimant is not responsible for any balance.

The claimant is responsible for payment of: (1) unauthorized treatment, (2) medical care not related to the injury, (3) medical services if treatment is not received for 60 months, (4) secondary medical services and palliative or maintenance care unless specifically covered and (5) medical procedures specifically excluded. [ARM 24.29.1401 and §39-71-704, MCA]

- Temporary total disability (TTD) benefits are based on  $66\frac{2}{3}\%$  of the claimant's average weekly gross wages, subject to a maximum of the state's average weekly wage, and are paid bi-weekly until the claimant returns to work or has reached maximum medical improvement (MMI). [§§39-71-701 and 39-71-740, MCA] If the claimant is classified as permanently totally disabled (PTD), benefits can continue until they reach retirement age. [§39-71-710, MCA]
- If prior to attaining maximum medical improvement and due to medical restrictions, the claimant returns to work at less than the wages received at the time of injury, they may be entitled to temporary partial disability (TPD) benefits. Temporary partial disability is limited to 26 weeks unless extended by the insurer/adjuster. [§39-71-712, MCA]
- If after reaching maximum medical improvement, the claimant has a residual impairment, greater than zero, the insurer/adjuster is required to pay out the permanent partial disability (PPD) liability bi-weekly, unless the claimant requests a lump sum payment. [§§39-71-703 and 39-71-741, MCA]
- Other permanent partial disability liability is based on age, education, loss of earning capacity and work capacity restrictions. These criteria are determined based on the specifics of each individual case. [§39-71-703, MCA]
- If the worker is precluded from returning to the job they held at the time of injury and suffers an actual wage loss or has an impairment of 15% or greater, they are eligible for rehabilitation services. The insurer/adjuster designates a rehabilitation provider and rehabilitation services are provided with the goal of returning the claimant to work as soon as possible. If a rehabilitation plan is established which indicates some type of retraining, the claimant may be eligible to receive monies for tuition, fees, books and other reasonable and necessary retraining expenses. The worker may also receive biweekly benefit payments based on their temporary total disability rate. [§39-71-1006, MCA] Financial assistance is also available for reasonable travel and relocation for training and job-related expenses, subject to a maximum amount of \$4,000. [§39-71-1025, MCA]
- Medical benefits may remain available for at least 60 months (5 years) from the last date of service. The insurer may not be required to furnish palliative or maintenance care after the claimant has achieved maximum medical improvement. [§39-71-704(1)(e), MCA]

## ***Montana Workers' Compensation System Administration***

The Montana Department of Labor and Industry, Employment Relations Division (ERD) provides a wide variety of services and regulation related to workers' compensation and safety.

### **Workers' Compensation Regulation Bureau**

The **Contractor Registration Unit** ensures construction businesses with employees register and comply with workers' compensation requirements. The law provides protection from liability for workers' compensation claims for contractors who use the service of other registered construction contractors.

The **Uninsured Employers Fund Unit** ensures employers and employees are protected under the Workers' Compensation and Occupational Disease Acts. The unit enforces coverage requirements for all employers, pays benefits to injured workers whose employers did not have workers' compensation coverage and manages the fund from which benefits are paid.

The **Subsequent Injury Fund Unit** certifies workers with permanent impairments that have a substantial obstacle to obtaining employment and administers the funds that are used to offset claim costs associated with subsequent injuries to these workers.

The **Medical Regulations Unit** administers a program that provides an effective and equitable method of health care cost containment. Medical fee schedules are established by the unit and utilized by insurers to reimburse medical providers.

The **Carrier Compliance Unit** monitors compliance of private workers' compensation carriers. The unit also licenses professional employer organizations and processes extraterritorial agreements (Plan 2).

The **Independent Contractor Central Unit** issues decisions on employment relationships for the Department of Revenue, Labor Standards, Unemployment Insurance and Workers' Compensation Compliance. The unit also issues Independent Contractor (IC) Exemptions.

The **Self-Insurance Unit** administers a program of employers who elect to be self-insured for workers' compensation (Plan 1).

## **Workers' Compensation Claims Assistance Bureau**

The **Claims Unit** ensures compliance with the Workers' Compensation and Occupational Disease Acts relating to benefits and claims. The unit also regulates attorney fees, administers the occupational disease panel process and provides assistance to insurers, attorneys and injured workers.

The **Data Management Unit** enters data on new claims, receives data on claims through Electronic Data Interchange (EDI), tracks policy coverage, maintains the workers' compensation database system and provides a comprehensive annual report on workers' compensation to the governor and the legislature.

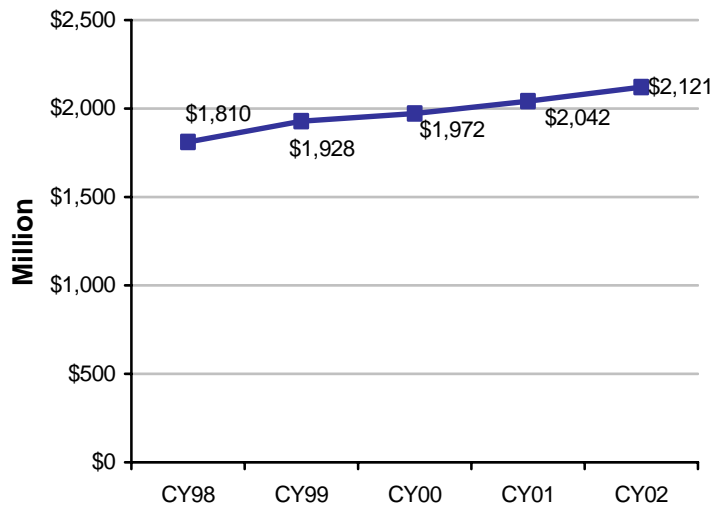
The **Mediation Unit** provides an alternative method of resolving workers' compensation benefit disputes before the dispute goes to the Workers' Compensation Court. This is a mandatory non-binding process.

## **Occupational Safety & Health Bureau**

The **Occupational Safety & Health Bureau** conducts inspections of public employers, performs on-site consultations for private employers, and inspects coalmines and sand and gravel operations throughout the state. The Bureau provides safety and occupational health training for both public and private employers.

## Montana Workers' Compensation Market

**Gross Annual Payroll  
Plan 1 - By Calendar Year**



Montana employers have options for obtaining workers' compensation coverage for their employees.

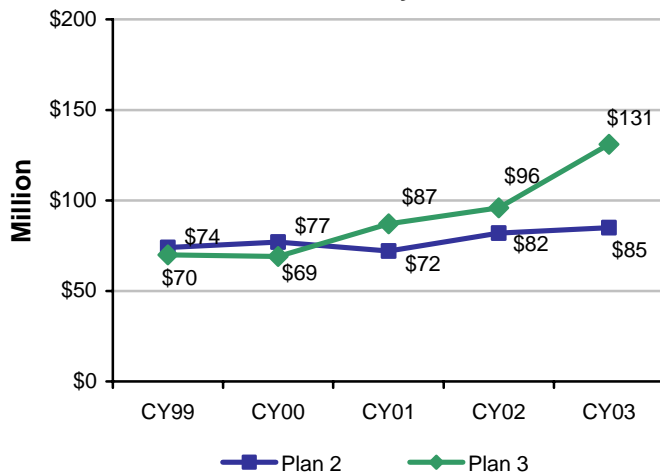
Employers with sufficient cash reserves may qualify as self-insured (Plan 1), either individually or by joining with other employers in their industry to form a self-insured group. Montana currently has 41 individual self-insured employers, four private groups (127 employers) and five public groups (388 employers).

Employers may obtain coverage with private insurance companies (Plan 2) in the voluntary market. During calendar year 2003, there were 450 private insurance companies who were authorized to write workers' compensation insurance in Montana.

Employers can insure through Montana State Fund (Plan 3). As the insurer of last resort, the Montana State Fund assures all Montana employers can provide workers' compensation insurance for their employees.

The change in the Plan 1 and insurer's market share is reflected in the table below.

**Premium Dollars  
Plans 2 and 3 - By Calendar Year**



**Market Share  
By Plan and Calendar Year**

Calendar Year	1999	2000	2001	2002	2003
Plan 1 – Payroll	\$1,927,960,055	\$1,971,770,980	\$2,042,192,981	\$2,121,728,801	*NA
Plan 2 – Premium	\$74,142,380	\$77,129,965	\$72,431,388	\$81,725,533	\$85,081,186
Plan 3 – Premium	\$70,422,976	\$69,411,843	\$86,813,640	\$95,558,150	\$131,804,047

**Note:** \*Calendar year 2003 Gross Annual Payroll data was not available when this report was published.

## ***Significant Court Cases***

Case summaries are taken from the Workers' Compensation Court Website: <http://wcc.dli.state.mt.us>

### **MARTIN McLAUGHLIN vs. LIBERTY NORTHWEST INSURANCE CORPORATION**

#### **2003 MTWCC 69**

**Summary:** In 2001 the employer provided its employees with an option of characterizing \$5 an hour of the pay they were already receiving as travel reimbursement. Claimant elected to do so. He was thereafter injured. At that time he was receiving \$14 an hour, \$5 of which was characterized as travel reimbursement for going to and from work. Had claimant not made the earlier election he still would have received the \$14 an hour and it would have all been characterized as wages. Nonetheless, the insurer refused to include the \$5 an hour in computing the claimant's wages for benefit purposes.

**Held:** The insurer must include the full \$14 an hour in computing the claimant's wages for purposes of benefits. Travel pay can be excluded from wages only if it is in fact travel pay and it meets the requirements of ARM 24.29.720. The \$5 at issue in this case did not meet the requirements since it was in lieu of and replaced claimant's customary wages. Moreover, the amount bore no direct or indirect relationship to the claimant's actual expenses for traveling to and from work and was not computed in accordance to any of the methods permitted under ARM 24.29.720.

### **WILLIAM HARDGROVE vs. TRANSPORTATION INSURANCE COMPANY**

#### **2003 MTWCC 57**

**Summary:** Claimant and insurer jointly petitioned the Court for a determination as to whether the claimant's asbestosis claim is time-barred. He ceased working for W.R. Grace in 1984. At the time of his retirement section, 39-72-403(3), MCA, provided that any claim for occupational disease benefits must be brought within three years after the claimant-ceased employment. The provision was repealed in 1985. In 1998 claimant was diagnosed with asbestosis resulting from his work for W.R. Grace.

**Held:** The claim is time-barred. The 1985 repeal of section 39-72-403(3), MCA (1983), was expressly made applicable to exposures occurring after the 1985 repeal. The latent injury doctrine is inapplicable since subsection (3) is a statute of repose and in any event expressly overrides the doctrine. Finally, the subsection is not unconstitutional either under the Full Redress Clause or the Equal Protection Clause. **Note: This case has been appealed to the Montana Supreme Court. That decision is pending.**

## **DALE REESOR vs. MONTANA STATE FUND**

### **2003 MTWCC 51**

**Summary:** Claimant was receiving social security retirement benefits at the time he suffered an industrial accident. He received an impairment award but was denied other permanent partial disability (PPD) benefits pursuant to section 39-71-710, MCA (1999), which provides that persons who are receiving social security benefits or are eligible for full social security retirement benefits are ineligible for PPD benefits other than an impairment award. Claimant challenges the constitutionality of section 39-71-710, MCA, on equal protection grounds and seeks full PPD benefits.

**Held:** Section 39-71-710, MCA, is constitutional. Receipt of retirement benefits or eligibility for such benefits is a rough yardstick for determining whether there will be future wage loss. Such rough measures do not violate equal protection guarantees. **Note: This case has been appealed to the Montana Supreme Court. That decision is pending.**

## **LANDIS BJORGEN vs. MELOTZ TRUCKING, INCORPORATED & UNINSURED EMPLOYERS' FUND**

### **2003 MTWCC 32**

**Summary:** Claimant alleged that he suffered an industrial injury while working for an uninsured employer. The Uninsured Employers' Fund (UEF) denied liability based on an independent contractor exemption issued to the claimant and also questioned whether claimant had injured himself at work.

**Held:** The claimant injured himself at work. Claimant was hired as an employee and there was no reliance on his exemption. Moreover, the job for which he was hired was outside the scope of the exemption. He is therefore entitled to benefits from the UEF.

## **ROBERT HERNANDEZ vs. ACE USA**

### **2003 MTWCC 31**

**Summary:** Claimant petitioned for a lump sum of his future permanent total disability benefits. The insurer's Montana claims adjuster recommended settlement but was overruled by the employer, i.e., by the insurer's insured. Claimant also seeks a 15% impairment award pursuant to *Rausch v. State Compensation Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

**Held:** Section 39-71-107(3), MCA (2001), requires insurers to designate a resident Montana claims adjuster with final settlement authority. Section 39-71-2203(3), MCA (2001), provides that an insurer is directly liable to claimants. ACE violated both sections by giving settlement authority to its insured employer. Since the Montana adjuster would have approved the lump-sum request and, more probably than not, the Department of Labor and Industry would have approved the settlement, the claimant is entitled to the \$75,000 lump-sum conversion recommended by the Montana adjuster. He is also entitled to a \$10,080 impairment award pursuant to *Rausch v. State Compensation Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

**ANN BUSTELL vs. AIG CLAIMS SERVICE, INCORPORATED/ THE INSURANCE COMPANY OF PENNSYLVANIA**

**2003 MTWCC 11**

**Summary:** Dispute over amount of reimbursement for twenty-four hour domiciliary care furnished a quadriplegic petitioner. Insurer contends that reimbursement is limited to the daily Medicaid rate for nursing homes. The petitioner also seeks reimbursement for home improvements, a handicap van, and a voice-activated computer.

**Held:** The limitation in section 39-71-1107(3), MCA (1999), for reimbursement of domiciliary care on its face applies only to domiciliary care provided by family members. Petitioner's request for reimbursement for home improvements, a handicap van, and a computer, does not fall under the primary medical services provision she cites. § 39-71-704(a), MCA (1999).

**LUCY HERNANDEZ vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH**

**2003 MTWCC 5**

**Summary:** Ruling on insurer's duty to claimant.

**Held:** Workers' compensation insurers are directly liable to claimants and have direct duty to claimants when adjusting claims. Insurers cannot delegate their duties to insured employers.

**JAPETH EDMUNDS vs. LIBERTY NORTHWEST INSURANCE**

**2004 MTWCC 11**

**Summary:** An employee (claimant herein) of a subcontractor was injured on the job. The subcontractor was uninsured and the claimant therefore invoked section 39-71-405, MCA (1995), and sought benefits from the insurer of the general contractor. The insurer denied liability based upon section 39-9-207, MCA (1997), which exempts persons employing registered contractors from workers' compensation liability. At the time of the claimant's injury, the subcontractor had a certificate as a registered contractor. The certificate, however, on its face stated that the contractor registration was invalid if the subcontractor employed non-exempt workers.

**Held:** Section 39-9-207, MCA, is inapplicable since there was no valid contractor registration covering the subcontractor in the event he hired non-exempt employees. Section 39-71-405, MCA, is therefore applicable. Under that section the general contractor's insurer is liable for the claimant's industrial injuries.

**RAM MONTANA, INCORPORATED vs. INDEPENDENT CONTRACTOR CENTRAL UNIT/  
UNINSURED EMPLOYERS' FUND**

**2004 MTWCC 13**

**Summary:** RAM Montana, Incorporated, a Nevada corporation with offices in Montana and extensive contacts with Montana, was in the business of doing contract remodeling jobs for Payless Shoe stores throughout the United States. The Independent Contractor Central Unit determined that its workers, including crew leaders, were employees subject to the Montana Workers' Compensation Act. Since RAM was uninsured in Montana (and elsewhere) from March 18, 1995 through December 31, 1997, the Uninsured Employers' Fund imposed penalties on RAM pursuant to section 39-71-504, MCA. RAM appeals, alleging that its workers were not subject to Montana workers' compensation requirements because their work was performed outside of Montana and that, in any event, its workers were independent contractors or employed by independent contractors.

**Held:** RAM's crew leaders and workers were never independent contractors. Workers based in Montana, who mustered out of Montana and traveled to and from Montana for temporary jobs in other states, were subject to Montana workers' compensation requirements. However, crew leaders and workers who did not reside or work on jobs in Montana were not subject to Montana workers' compensation requirements and should have been excluded from any penalty determination.

## ***Montana Supreme Court Decisions on Workers' Compensation and Occupational Disease***

These decisions can be found at the State Law Library Website: [www.lawlibrary.state.mt.us](http://www.lawlibrary.state.mt.us)

### **EULA MAE HIETT vs. MISSOULA COUNTY PUBLIC SCHOOLS**

#### **2003 MT 213**

In deciding this appeal, the Supreme Court focused on the question of ‘how or at what point’ an injured worker ‘achieves’ medical stability. The Court found the phrase “‘achieving’ medical stability and ‘achieved’ medical stability as used in §§ 39-71-116(25) and 39-71-704(1)(f), MCA (1995), respectively, to mean the *sustainment* of medical stability. Given this interpretation, a claimant is entitled to such “primary medical services” as are necessary to permit him or her to *sustain* medical stability.”

### **MATHEWS vs. LIBERTY NORTHWEST INSURANCE CORPORATION**

#### **2003 MT 116**

In this companion case to Wild vs. Montana State Fund (Supreme Court no. 2003 MT 115) The Court held that § 39-71-401(3) MCA, does not preclude a factual inquiry into the existence of an employer/employee relationship if the worker holds an independent contractor exemption. The Court also ruled that § 401(3) in conjunction with § 39-71-120, MCA, requires the employer to make “an initial good faith inquiry of the worker to determine that he or she does, in fact, meet the control and independently established business tests before the employer employs the worker as an IC and if the employer determines the worker is an IC, to thereafter treat the worker as an IC and not as an employee...”

### **RICHARD WIARD vs. LIBERTY NORTHWEST INSURANCE CORPORATION**

#### **2003 MT 295**

In this case, the Supreme Court affirmed the Workers’ Compensation Court’s ruling that the injured workers’ claim for medical benefits is barred under section 39-71-704 (1991), which provides that medical benefits terminate if not used for 60 or more months.